

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 454 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE M.H.KADRI

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

MANU MERU & ANOTHER

Versus

STATE OF GUJARAT

Appearance:

MR KB ANANDJIWALA for the Appellants.

MR MA BUKHARI, APP, for the Respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 05/12/96

ORAL JUDGEMENT (per PANCHAL,J.)

By means of filing this appeal under S.374(2) of the Code of Criminal Procedure, 1973, the appellants have questioned legality and validity of the judgment and

order dated June 13, 1989, rendered by the learned Addl. Sessions Judge, Morbi, Dist.Rajkot in Sessions Case No. 4 of 1988, convicting them under S.302 of the I.P.code and S.135 of the Bombay Police Act, and sentencing them to R.I. for life and fine of Rs.500/-, in default S.I. for 6 months for the offence punishable under S.302 of the I.P.code, as well as S.I. for 3 months and fine of Rs.100/- in default S.I. for 1 week for the offence punishable under S.135 of the Bombay Police Act. It may be mentioned that the substantive sentences are ordered to run concurrently.

2. Deceased Mumtaz @ Madhuben Babubhai was resident of Morbi Town. She was married to one Parshottam Samji who was native of village Jhala Jodhpar, Taluka Morbi. Deceased Mumtaz had come in contact with Amad Ismail, and had started residing with him. After intervention of caste people, marriage between deceased Mumtaz and Parshottam Samji was dissolved. The incident in question took place on October 7, 1987. On that day in the morning, deceased Mumtaz had decided to visit vegetable market for purchasing vegetables. However, before purchasing vegetables she went to purchase ear-rings from a handbarrow. When she was purchasing ear-rings, the accused came from behind and dealt knife blows to her. Consequently she was injured and sat down near the cabin. She started bleeding profusely and shouted for help. One Railo and two others removed her to Government Hospital, Morbi, in an autorickshaw. Dr.D.S.Patel, who was on duty at the hospital informed Head Constable Manishanker Shivram, who was at the relevant time, in charge of Morbi City Police Station that Mumtaz was admitted in Morbi Government Hospital with multiple knife injuries on her body, and her condition was precarious. On the basis of the said message, PSI Mr.G.N.Jalwania, went to Government Hospital and recorded complaint of injured Mumtaz. As condition of injured Mumtaz deteriorated, she was removed to Rajkot Civil Hospital, Rajkot for further treatment. PSI Mr.Jalwania, by wireless message requested Police Officer in charge of Rajkot Police Control to arrange for recording dying declaration of injured Mumtaz. One Ismail Valimohmad, Head Constable was on duty at Rajkot Hospital Police Chowky. He was informed by a peon of the Hospital that Mumtaz was admitted in the hospital with multiple knife injuries on her body. Therefore, the Head Constable went there and found that Mumtaz was lying on a stretcher. Injured Mumtaz was identified to him by Amad Ismail. Head Constable Ismail Valimohmad recorded the version of injured Mumtaz as narrated by her on a piece of paper, and on that basis made an entry in the hospital register. After receipt of the message flashed by PSI

Mr.Jalwania, Head Constable Ismail Valimohmad requested the Deputy Mamlatdar and Executive Magistrate, Rajkot City to record the dying declaration of injured Mumtaz. At the relevant time, curfew was imposed in Rajkot City, and Deputy Mamlatdar Mr.M.J.Bhinde was on duty at Jubilee Police Chowky. He requested the Collector to permit him to go to hospital for the purpose of recording the dying declaration. After obtaining necessary permission, he went to Rajkot Civil Hospital for recording statement of injured Mumtaz. At the hospital injured Mumtaz was identified to him by Dr.Parmar, and after obtaining necessary endorsement from the doctor to the effect that injured Mumtaz was in a fit state of mind to make statement, Mr.Bhinde recorded the statement of injured Mumtaz. After lodging of the complaint, PSI Mr.Jalwania went to the place of occurrence and prepared panchnama of the scene of offence. Thereafter he went to the police station where he found that the appellants had voluntarily surrendered themselves to the police. The Investigating Officer therefore, prepared arrest panchnama. According to the investigating agency, appellant no.1 produced a bloodstained knife with brass handle. In the complaint Ramla was also named and therefore, search for Ramla was made. Ramla came to be arrested on October 8, 1987, and he was arraigned as accused no.3 in the case. On October 8, 1987, the Investigating Officer recorded the statement of owners of shops which are situated in the vicinity of place of occurrence. On October 8, 1987, at about 12.45 p.m. he received wireless message that injured Mumtaz had expired. Therefore, inquest was held on the dead body, and it was sent for postmortem examination. The weapons produced by the accused as well as bloodstained clothes of the accused were sent to Forensic Science Laboratory for analysis. On receipt of postmortem notes and report from FSL, and after completing investigation, three accused were charge-sheeted in the Court of the learned Judicial Magistrate First Class, Morbi, under S.302 read with S.34 I.P.Code as well as S.135 of the Bombay Police Act.

3. As the offence under S.302 of the I.P.code is exclusively triable by Court of Sessions, the case was committed to Sessions Court for trial, and numbered as Sessions Case No.4 of 1988, in the Court of the learned Addl. Sessions Judge, Morbi. The learned Judge framed charge against the accused at Ex.1, under S.302 read with S.34 of the I.P.code and S. 135 of the Bombay Police Act. The charge was read over and explained to the accused, who pleaded not guilty to the same and claimed to be tried. The prosecution therefore, examined (1)

Chandulal Laxmichand, PW 1, Ex.12, (2) Jasubha Ratansang, PW 2, Ex. 13, (3) Parmanand Versibhai, PW 3 Ex. 14, (4) Bharat Shantilal, PW 4, Ex. 16, (5) Nenshibhai Laxmichand, PW 5, Ex. 16, (6) Parshottam Versi, PW 16, Ex. 50, (7) Dr.Narendra Shantilal Pathak, PW 6, Ex. 23, (8) Dr. Dahyabhai S. Patel, PW 7, Ex. 27, (9) Mulraj Jivraj Bhinde, PW 8, Ex. 31, (10) Farida Alibhai, PW 9, Ex. 35, (11) Ahmad Juma, PW 10, Ex.36, (12) Rahimsha Railo Valisha, PW 11, Ex. 37, (13) Mukesh Amarshibhai, PW 12, Ex. 39, (14) Jagdish Valji, PW 13, Ex. 43, (15) Gajanand Maganlal, PW 14, Ex. 44, (16) Natubha Babubha, PW 15, Ex. 45, (17) Husein Isa, PW 17, Ex. 51, (18) Ismail Valimohmad, PW 18, Ex. 52, (19) Parshottam G. Tadvi, PW 19, Ex. 54, (20) Kanakrai Kalyanji, PW 20, Ex. 55, (21) Manishanker Shivram, PW 21, Ex. 57, (22) Amad Ismail, PW 22, Ex. 62, (23) Ramju Mohmad, PW 23, Ex. 66, (24) Mahendra Naran, PW 24, Ex. 71, (25) Harshad Bachubhai, PW 25, Ex. 75, (26) G.N.Jalwania, PW 26, Ex. 76, to prove its case against the accused.

4. The prosecution also relied on documentary evidence such as complaint of deceased Mumtaz which was recorded by PSI Mr.Jalwania at Government Hospital and subsequently treated as her dying declaration Ex.78, entry made by Head Constable Ismail Valimohmad in the hospital register at Ex.53, dying declaration recorded by Executive Magistrate Ex.33, various panchnamas prepared during the course of investigation, panchnama of the place of occurrence, report received from Forensic Science Laboratory, postmortem notes, etc. to prove its case against the accused.

5. The learned Judge questioned the accused generally on the case and recorded their statements under S.313 of the Code of Criminal Procedure, 1973 after recording of the evidence of prosecution witnesses was over. In further statements, the case of the accused was that of total denial. However, no evidence was led by any of the accused in defence.

6. On appreciation of the evidence led by the prosecution, the learned Judge held that Bai Mumtaz died a homicidal death. The learned Judge concluded that the prosecution has proved that the appellants intentionally caused bodily injuries to Bai Mumtaz by means of knives which were sufficient in the ordinary course of nature to cause her death, and therefore, committed offence punishable under S.302 of the I.P.Code. The learned Judge found that the accused had possessed knives in contravention of notification issued by District Magistrate under the provisions of Bombay Police Act, and

held that the appellants committed offence punishable under S.135 of the Bombay Police Act. The learned Judge disbelieved the case of the prosecution against original accused no.3, i.e. Ramesh Raisinh and held that the case against him was not free from doubt. In view of these conclusions, the learned Judge acquitted original accused no.3, but convicted the appellants under S.302 of the I.P.code as well as S.135 of the Bombay Police Act, and imposed sentences which have been referred to earlier, by the impugned judgment, giving rise to the present appeal.

7. Mr.K.B.Anandjiwala, learned Counsel for the appellants has taken us through the entire evidence on record. After stressing the fact that the so called eye-witnesses had turned hostile, it was emphasised on behalf of the appellants that material part of each of the three dying declarations is proved to be false by other reliable evidence on record and therefore, the appeal deserves to be accepted. It was contended that the learned Judge materially erred in placing reliance on the dying declaration recorded by the Executive Magistrate because the version narrated by the victim is intrinsically not sound and does not accord with probabilities and therefore, the appellants should be acquitted of the charge levelled against them. It was pleaded that the evidence led by the prosecution does not establish that the victim was in a position to identify her assailants and therefore, benefit of doubt should be given to the appellants by reversing the impugned judgment.

8. Mr.M.A. Bukhari, learned APP, submitted that before recording the statement of injured Mumtaz, the Executive Magistrate had satisfied himself that Mumtaz was in a fit state of mind to make statement and therefore, the learned Judge was justified in placing reliance on that dying declaration and recording conviction against the appellants. The learned Counsel for the Respondent-State referred to the entry made by Head Constable Ismail Valimohmad in the hospital register as well as the complaint recorded by PSI Mr.Jalwania and contended that material part of the version narrated by the deceased is not proved to be false by other reliable evidence, and the three dying declarations should be acted upon by the court while sustaining the impugned judgment. The learned Counsel for the respondent also referred to evidence of witnesses before whom deceased had made oral dying declarations as well as report of the Forensic Science Laboratory, and pleaded that having regard to the evidence led by the prosecution, the appeal filed by the appellants should be dismissed.

9. The fact that Bai Mumtaz died a homicidal death is not disputed before us in the present appeal. When she was admitted in Government Hospital, Morbi on October 7, 1987 in the morning, Dr.D.S.Patel who had attended her had sent a telephonic message to Morbi City Police Station about her admission in the hospital in serious condition. Injuries noted by Dr.Patel have been stated by him in detail in his deposition. In the autopsy report prepared by Dr.N.S.Pathak of Rajkot Civil Hospital, Rajkot also the injuries sustained by the deceased are mentioned in detail. The cause of death as indicated in the postmortem notes was shock due to injuries to the intestine and liver and consequent to excessive bleeding. Having regard to the evidence led by prosecution and more particularly the medical evidence, we are of the view that the finding recorded by the learned Judge that deceased Mumtaz died a homicidal death is eminently just and the same is hereby upheld.

10. In order to bring home the guilt to the accused, prosecution examined (1) Chandulal Laxmichand, PW 1, Ex. 12, (2) Jasubha Ratansang, PW 2, Ex. 13, (3) Parmanand Versibhai, PW 3, Ex. 14, (4) Bharat Shantilal, PW 4, Ex. 15 (5) Nenshibhai Laxmichand, PW 5, Ex. 16 and (6) Parshottam Versi, PW 16, Ex. 50, claiming that they had witnessed the incident. However, a bare look at their sworn testimony makes it abundantly clear that they have not supported the prosecution case, and were declared hostile after obtaining necessary permission from the court. The principle relating to appreciation of evidence of a hostile witness is well settled. Where the court gives permission to the prosecutor to cross-examine his own witness thus characterising him as a hostile witness, that fact does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon his testimony if corroborated by other reliable evidence. However, in the present case, it is not brought to the notice of this court by the learned Counsel for the Respondent that the testimony of any of the hostile witnesses is corroborated by any other reliable evidence on record. Under the circumstances, we are of the opinion that their evidence is of no help to the prosecution in deciding the guilt or otherwise of the appellants.

11. Once the evidence of witnesses claiming to be eye-witnesses is ignored from consideration, the court is left with evidence relating to three dying declarations and oral dying declarations alleged to have been made by

the deceased before certain relatives for the purpose of deciding whether the prosecution has proved the charge levelled against the appellants.

12. Before appreciating the evidence of the witnesses and the contents of the dying declarations, it would be relevant to notice the law relating to dying declaration. S. 32(1) of the Indian Evidence Act, 1872, is an exception to the general rule that hearsay evidence is not admissible evidence and unless the evidence is tested by cross-examination, it is not creditworthy. Under S.32 when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the case of that person's death comes into question, such statement, oral or in writing, made by the deceased to the witness is a relevant fact, and is admissible in evidence. The statement made by the deceased called dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. Dying declaration made by a person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. Sanctity attached to dying declaration is that a person on the verge of death would not commit the sin of implicating somebody falsely. The shadow of impending death is, by itself, the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. Dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence coming as it does, from the mouth of the deceased victim. Once the statement of a dying person and evidence of witnesses testifying to the same passes the test of careful scrutiny of the court, it becomes very important and relevant piece of evidence, and if the court is satisfied that the dying declaration is true and free from any embellishment, such a dying declaration by itself, can be sufficient for recording conviction, even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance, then the court has to look for corroboration. The rule of corroboration requires that dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted unless such declaration can be shown to be unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. Generally, following three tests have been devised in judicial pronouncements, in order to

answer the question whether a dying declaration is true;(i) Was the victim in a position to identify the assailants ? (ii) Whether the version narrated by the victim is intrinsically sound and accords with probabilities ? and (iii) Whether any material part is proved to be false by other reliable evidence ?. A dying declaration stands on the same footing as any other piece of evidence, and has to be judged in the light of surrounding circumstances as well as with reference to the principles governing weighing of evidence. The evidence furnished by it must be considered as the evidence of any witness though some special considerations arise in the assessment of a dying declaration which do not arise in the case of assessing the value of statements made by witnesses. Truthfulness of a dying declaration has to be tested with reference to the circumstances and other relevant facts and can be rejected as unreliable on the ground of not being in conformity with other reliable evidence on record. The court should test the credibility of dying declaration with reference to the circumstances like the opportunity to the victim to observe his assailants, his capacity to remember the facts stated, his state of mind when he made the declaration, consistency of the declaration if made on several occasions and if the declaration was made at the earliest. It is well settled that the statement should be consistent throughout if the deceased had several opportunities of making such declarations, i.e. if there are more than one dying declarations, they should be consistent. In a case where there are more than one dying declarations, and if some inconsistencies are noticed between one and another, the court has to examine the nature of the inconsistencies, viz. whether they are material or not. In scrutinising the contents of various dying declarations in such a situation, the court has to examine the same in light of various surrounding facts and circumstances.

13. In light of the above principles, we will now consider the three dying declarations produced in the instant case, to ascertain the truth. Evidence of PSI Mr.Jalwania indicates that on receiving message from Head Constable Manishaker Shivram, he had gone to Government Hospital, Morbi to record complaint of injured Mumtaz. The witness has deposed that within 5 minutes of receiving information, he had reached Morbi Government Hospital and contacted injured Mumtaz in the emergency ward. The witness has asserted that he had recorded the complaint of injured Mumtaz as narrated by her, and had obtained her signature. Though this witness is cross-examined searchingly by the defence, nothing is

elicited to discredit his version. The complaint recorded by PSI Mr.Jalwania is produced on the record of the case at Ex. 78. Free English translation of the same reads as under :

" Today, i.e. on October 7, 1987 at about 9.30

A.M. I had come to the vegetable market from Nagar Darwaja for purchasing vegetables, but before purchasing vegetables, I was purchasing ear-rings from a cabin situated behind the vegetable market. At that time, Manu Meru as well as husband of Manju, i.e.Ramlo came from the side of Nagar Darwaja. Both of them were armed with knives and started giving knife blows to me indiscriminately in quick succession. Consequently I am injured on the stomach as well as on the back. I immediately sat down near the cabin. I started bleeding profusely, and shouted for help but nobody intervened to rescue me. Those two persons ran away towards Lohanapara, Danapith. At this point of time, one Railo and 2 to 3 other persons who were standing there brought me in an autorickshaw to the hospital.This Manu Meru is the son of my father's elder brother. I am staying with Amad Ismail as his wife since one year under an agreement of friendship. The reason for attack on me is that I am staying with Amad Ismail at his house."

The complaint relates to the cause of death of Mumtaz, and therefore, would fall within the ambit of S.32(1) of the Indian Evidence Act. It is well settled that where, after making statement before police the victim succumbs to injuries, the statement can be treated as dying declaration, and is admissible under S.32(1) of the Indian Evidence Act. On the facts and in the circumstances of the case, we are of the opinion that the learned Judge did not commit any error in treating the complaint recorded by PSI Mr.Jalwania as the dying declaration of Mumtaz. A bare look at the contents of this dying declaration would establish beyond reasonable doubt that deceased Mumtaz named appellant no.1 and original accused no.3 whose acquittal is not challenged before us, as the persons who had inflicted knife blows on her.

14. As noted earlier, on October 7, 1987, Ismail Valimohmad, PW 18, Ex.52 was on duty at Rajkot Hospital Police Chowky. His evidence indicates that at 12.05 P.M., a peon of the Hospital had called him to the hospital after informing him that one Mumtaz was admitted

in the hospital with multiple knife injuries on her body. This witness has stated before the court that on receiving the necessary information from the peon of the hospital, he had gone to the hospital and found that injured Mumtaz was lying on a stretcher. His evidence shows that Mumtaz was identified to him by Amad Ismail. This witness has in no uncertain terms stated that thereafter he had recorded the version of Mumtaz on a piece of paper, and on that basis, had made an entry in the hospital register. The entry made by him is produced at Ex. 53. Though this witness is effectively cross-examined on behalf of the appellants, nothing has been brought on record to discredit his version as narrated by him in examination-in-chief. It is not pointed out to the court that he is related either to the deceased or to Amad Ismail, with whom the deceased was staying. The record does not indicate that the witness had any enmity with the appellants. Under the circumstances, the court has no reason to disbelieve his say on oath that he had recorded the version of the incident as narrated by injured Mumtaz on a piece of paper and thereafter had made necessary entry in the hospital register. Free English translation of entry Ex. 53 reads as under :-

" Madhu @ Mumtaz, wife of Amad Ismail Ghanchi, aged 22, resident of Joshinagar, Morbi, is admitted in Ward No.2 for treatment as she was assaulted with knives by Manji and Ramesh near vegetable market. Amad Ismail Khatri resident of Joshinagar, Morbi, informs that necessary papers are prepared by Morbi police and dying declaration is to be recorded."

This entry shows that injured Mumtaz had mentioned names of Manji and Ramesh as her assailants. It may be mentioned that no evidence worth the name is produced by the prosecution to prove that appellant no.1 Manu Meru is also known as Manji or Manji whose name is mentioned in this entry is none other than appellant no.1. The entry made by Head Constable Ismail Valimohmad makes it abundantly clear that out of Manji and Ramesh, only Ramesh was prosecuted in the case as accused no.3. Therefore, this entry cannot be interpreted to mean as implicating the present appellants at all.

15. The third dying declaration relied on by the prosecution is one which was recorded by Executive Magistrate and Deputy Mamlatdar Mulraj Jivraj Bhinde, PW 8, Ex.31. The testimony of this witness shows that Head Constable Ismail Valimohmad had addressed a report to him

for recording the dying declaration. That report is produced at Ex. 32. His evidence further shows that when Executive Magistrate Mr.Bhinde came for recording the dying declaration, he was given report Ex. 32 wherein the names of the assailants were mentioned to be Manu Meru and Ramesh, i.e. appellant no.1 and acquitted accused no.3. The witness has claimed that he contacted one Dr.Parmar who certified on Ex. 32 at 1.30 P.M. that the patient was conscious and therefore, he started recording the dying declaration at 13.35 hours and completed its recording by 13.45 hours. The full text of the dying declaration Ex.33 when freely translated into English reads as under :

" Your name : Mumtaz,
Father's name : Babubhai,
Husband's name : Ahmedbhai,
Age : 22 years,
Resident of : Joshinagar, Morbi,
Caste : Ghanchi,
What happened to you ?
Knife blows are inflicted on me.

Who assaulted you ?
My brother assaulted me.
What is the name of your brother ?
Manubhai.
Where does he reside ?
Kalika Plot, Morbi.
Was there anyone else with Manubhai ?
Yes. Rajubhai, who resides with Manubhai.
What is the reason of assault ?
I am assaulted by knife because I am staying with
Amad in his house.
Since how long do you stay in the house of Amad ?
Since two years.

Have you any child ?
Yes. One son aged 3 years.
Had you married with anyone previously ?
I had married with one Parshottam Samji, who is
resident of Jodhpar Jhala, Tal. Morbi.
Have you obtained divorce from Parshottam ?
Yes. I have obtained divorce.
When did the present incident take place ?
In the morning at 9.30 A.M. approximately.
What happened ?
Knife has pierced right side of my abdomen.
Who accompanied you ?

My husband Amad accompanied me.

Where knife blows were inflicted ?

Near vegetable market when I went to purchase vegetables in the morning. My brother Manu and Raju came and assaulted me with knives.

What happened then ?

Manu and Raju ran away after giving knife blows.

Who inflicted knife blows and what happened ?

Both were together. I cannot say as to who gave the knife blow first. Knife blow is given on abdomen. Because of the knife blows inflicted on me, I shouted and fell down. I do not know what happened thereafter. I am in the Rajkot Hospital when this dying declaration is being recorded.

Where the knife struck ?

The knife struck on the abdomen. "

A bare reading of the above quoted dying declaration shows beyond reasonable doubt that injured Mumtaz had named present appellants as perpetrators of the crime. Thus, if the three dying declarations which are relied upon by the prosecution are taken into consideration, it is evident that at three different stages, injured Mumtaz had given names of different persons as her assailants. As observed earlier, in the complaint which is recorded by PSI Mr. Jalwania injured Mumtaz referred to appellant no.1 and Ramlo, i.e. acquitted accused no.3 as her assailants whereas the entry made by Head Constable Ismail Valimohmad shows that injured Mumtaz implicated only original accused no.3 because it is not established by the prosecution that appellant no.1 was also known as 'Manji'. In the third dying declaration recorded by Executive Magistrate, injured Mumtaz mentioned the names of the present appellants, and did not refer to accused no.3 at all. Thus the statements of the deceased are not found to be consistent throughout. As is evident from the record of the case, the deceased had several opportunities of making dying declarations, and when there are more than one dying declarations, they must be consistent. Having examined and noticed the inconsistencies appearing in the three dying declarations, we are of the opinion that those inconsistencies are material. Reading the contents of the three dying declarations, it becomes highly doubtful whether deceased Mumtaz was in a position to identify her assailants. Had she been in a position to identify the assailants correctly, the discrepancies noted above would not have crept into the dying declarations. The material and integral part of the first dying declaration recorded

in the form of complaint is proved to be false by other reliable evidence, viz. entry made by Head Constable Ismail Valimohmad in the register kept at the hospital, as well as the dying declaration Ex.33 recorded by the Executive Magistrate. Similarly, contents of entry Ex. 53 made by Head Constable Ismail Valimohmad in the hospital register stands proved to be false if compared with the contents of complaint Ex. 78 recorded by PSI Mr.Jalwania as well as the dying declaration at Ex.33 recorded by the Executive Magistrate. On the same reasoning, material part of Ex. 33 which is the dying declaration recorded by the Executive Magistrate stands proved to be false with reference to complaint Ex. 78 recorded by PSI Mr.Jalwania and entry Ex. 53 made by Head Constable Ismail Valimohmad in the hospital register. As material part of the three dying declarations contradict and falsify each other, it would not be safe for the court to act upon either of them for the purpose of basing conviction of the appellants. The question whether any material part of any of the dying declarations is proved to be false by other reliable evidence on record, is not considered by the learned Judge at all while relying on the dying declaration recorded by Executive Magistrate. Having regard to the circumstances like the opportunity to the victim to observe her assailants, her capacity to remember the facts stated, her state of mind when she made the statement and inconsistency of the declarations made on several occasions, we are of the view that conviction of the appellants cannot be sustained by placing reliance on any of the dying declarations. On the facts and in the circumstances of the case we are inclined to hold that deceased was mentally and physically in a state of confusion and was drawing upon her imagination while she was making declarations. On subjecting three dying declarations to close scrutiny, we find that material and integral part of the version of the deceased in those declarations is not only the result of imagination on her part but is thoroughly inconsistent and therefore, we do not consider it safe to convict the appellants by placing sole reliance on those declarations. Conviction of the appellants, therefore, based on dying declaration Ex.33 recorded by Executive Magistrate, is not well-founded, and is liable to be set aside.

16. We may mention that the prosecution also relied on oral dying declarations made by injured Mumtaz before (1) Ahmad Juma, PW 10, Ex.36, (2) Rahimsha @ Railo Valisha, PW 11, Ex.37, and (3) Amad Ismail, PW 22, Ex. 62. Cogent and convincing reasons have been given by the learned Judge for disbelieving the prosecution case that

oral dying declarations made by the deceased to the witnesses implicate the present appellants. Those reasons are to be found in paragraph 14 of the impugned judgment. Witness Ahmad Juma claimed before the court that injured Mumtaz had declared before him that Manu Meru and Raju had given knife blows to her. It is brought on record during his cross-examination that he had not so stated before police when his statement was recorded by the Investigating Officer, during the course of investigation. It is also relevant to note that police statement of this witness was recorded on October 9, 1987, i.e. much after the names of the assailants were revealed by injured Mumtaz when her dying declaration was recorded by the Executive Magistrate. On the facts and in the circumstances of the case, it cannot be said that the learned Judge has committed any error in disbelieving this witness regarding his case that oral dying declaration was made by injured Mumtaz to him. Similarly evidence of Rahimsha Valisha, PW 11 regarding oral dying declaration, having been made to him, does not inspire any confidence of the court. This witness has also stated that in his police statement, he had never disclosed the fact that deceased Mumtaz had made oral dying declaration implicating Raju and Manu, i.e. the appellants, as her assailants. The learned Judge who had the advantage of observing the demeanour of the witness has rightly held that the witness referred to oral dying declaration just to help Amad Ismail with whom deceased Mumtaz was staying. Though the witness posed before the court that he was not knowing Amad Ismail, witness Amad Ismail in his evidence has clearly stated that he knew Railo since 5 to 7 years. Having regard to the facts of the case, we are of the view that the evidence of Rahimsha Valisha has been rightly discarded by the learned Judge. Amad Ismail, PW 22, Ex.62 has claimed that at Government Hospital, Morbi, injured Mumtaz had made oral dying declaration implicating the appellants and the acquitted accused. In cross-examination the witness had to admit that the fact that such a declaration was made by injured Mumtaz was never stated by him when his police statement was recorded. In view of the infirmities appearing in his evidence, it hardly needs to be emphasised that the case put forth by this witness regarding oral dying declaration deserves outright rejection. As noted earlier, these three witnesses have made material improvements in their respective testimony before the court regarding oral dying declaration having been made by deceased Mumtaz and their version is rightly disbelieved by the learned trial Judge.

17. The prosecution also relied on the report of the Forensic Science Laboratory, which indicated that the clothes of the appellants and the knives produced by them were stained with blood having 'O' group, which was also the blood group of the deceased. We may mention that the panch witnesses examined by the prosecution to prove the production and discovery of incriminating articles have not supported the prosecution case. From what is observed by the learned Judge in para 28 of the impugned judgment, it is evident that a serious attempt was made by the Investigating Officer to implicate the appellants and the acquitted accused falsely in the case. When the three accused were in police custody, the Investigating Officer had produced them before the learned Judicial Magistrate for recording their statements under S.164 of the Code of Criminal Procedure, 1973, and when the learned JMFC refused to record their statements, as Section 164 of the Code of Criminal Procedure was not complied with, they were produced by the Investigating Officer before the Executive Magistrate, where the accused are alleged to have produced three affidavits admitting their guilt. These affidavits were also sought to be produced in the case alongwith application Ex. 94. Said application Ex.94 was rejected by the learned Judge by order dated 26.5.1989 on the ground that the affidavits amounted to confession, which were not recorded in compliance with the statutory requirement of S.164 of the Code of Criminal Procedure, 1973. Even an attempt was made by the Investigating Officer to prove those three affidavits during the course of his examination before the court. But the learned Judge rightly prevented the Investigating Officer from proving the contents of those affidavits. Under the circumstances, the evidence regarding discovery of incriminating articles at the instance of the accused or incriminating articles having the same blood group as that of the deceased, can hardly be treated as sufficient and reliable evidence to bring home guilt to the appellants. On the facts and in the circumstances of the case, we are of the opinion that the prosecution has failed to prove its case beyond reasonable doubt against the appellants, and the appellants are entitled to benefit of doubt.

18. Though the prosecution has produced notification issued by District Magistrate under the provisions of the Bombay Police Act, prohibiting carrying of weapons like knives, spears, etc. the conviction of the appellants under S.135 of the Bombay Police Act cannot be sustained as we have held that the prosecution has not proved beyond reasonable doubt that any of the appellants caused

death of deceased Mumtaz by means of knives, and evidence regarding production of knives by the appellants is thoroughly unreliable. Therefore, conviction of the appellants under S. 135 of the Bombay Police Act is also liable to be quashed.

19. For the foregoing reasons, the appeal succeeds. Judgment and order dated 13.6.1989 rendered by the learned Addl. Sessions Judge, Morbi, Dist.Rajkot in Sessions Case No. 4 of 1988 convicting the appellants under S. 302 of the I.P.Code as well as S.135 of the Bombay Police Act, and sentences imposed therefor, are hereby set aside and quashed. The appellants are acquitted of the charges levelled against them. As the appellants are acquitted, the jail authorities are directed to set them at liberty immediately, unless required in any other case. The appeal accordingly stands allowed. Muddamal articles be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

abraham.